PCS in-building coverage. The battery life of mobile phones is continually increasing, while paging battery life begins to decrease as paging units provide more and more sophisticated services.

In addition to improvements in battery life, one-rate plans have encouraged customers to "leave on" their cellular, SMR and broadband PCS phones. These plans allow consumers to place and receive calls without incurring additional airtime charges. This, in turn, encourages customers to leave their phones on to receive calls and to give out their mobile number. The result is to diminish pagings' utility as a "screen" for mobile phone calls, thereby bringing mobile phone service into direct competition with paging. In short, the availability and price of the group of services including narrowband (messaging and data) and broadband (voice messaging and data) discipline one another and these services are properly considered as a single product market.

Nevertheless, AGI and PageNet each expects that traditional numeric and alphanumeric paging services will continue to be offered aggressively by the Combined Company, as well as dozens, if not hundreds, of other providers. Further, even if traditional paging service is considered a discrete product market, the merger of AGI and PageNet will have no adverse impact on these subscribers, as shown below in Section III.D.2. Indeed, those who choose to continue service with the Combined Company will benefit from the combination of improvements in customer support, billing and the like, which will directly result from the merger.

2. The Relevant Geographic Market

The relevant geographic market is the geographic service area in which all customers will likely face the same competitive alternatives for a product or service.[21] Currently, mobile wireless communications services, including cellular, broadband PCS, and narrowband services, are predominantly local in nature. Each of these services is also offered on a broader geographic basis, such as wide area and nationwide. These broader geographic services are widely provided through the ubiquitous availability of spectrum, and roaming and intercarrier agreements. Such services satisfy the demand of the population that expects to travel out of their local markets from time to time. Even here, though, not surprisingly, most of the calls to these units are predominantly local in nature. Thus, the market for these services remains a predominantly local one, and the relevant geographic market primarily local as well.

3. The Relevant Market Participants

As noted above, the mobile wireless communications market consists of not just traditional paging services, but also a myriad of substitutable services, including but not limited to, advanced messaging, cellular, PCS, and SMR, offered over varied and extensive spectrum allocations. Indeed, as the Commission itself has recognized, "digital technology employed by digital cellular, broadband PCS, and digital SMR providers allows two-way handsets to act as one-way pagers and advanced messaging devices,"[22] and licensees in the Phase II 220 MHz Service are also "permitted to provide voice, data,

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21 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17.

22 *Fourth CMRS Competition Report*, 14 FCC Rcd at 10185.

paging and fixed communications."[23] Several satellite providers offer one-way paging and advanced messaging services as well.[24] As discussed below, the availability and price of these offerings over an array of spectrum disciplines the price that can be charged for traditional paging and advanced messaging services offered over frequencies such as those predominantly used by both AGI and PageNet.[25]

With regard to the number of carriers capable of offering these services (in addition to paging companies), there are now at least five mobile telephone operators (two cellular, two broadband PCS, and digital SMR) in each of the 35 largest Basic Trading Areas ("BTAs") and at least three mobile telephone providers in 97 of the 100 largest BTAs.[26] Moreover, as with virtually all mobile wireless communications services today, many other mobile wireless communications providers also offer telemetry

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23 *Id.* at 10194.

24 *Id.* at 10187.

25 In fact, the spectrum allocation for frequencies over which paging can be provided, if alone or in conjunction with other services, far outstrips the amount of spectrum over which carriers have provided traditional paging services. These new allocations, including PCS, 220 MHz, SMR have hundreds of times the capacity over which paging carriers have traditionally operated.

26 These numbers refer only to mobile telephone operators currently operating in the 35 largest BTAs. Since 1995, the Commission has issued 102 MTA A and B Block licenses, 493 BTA C block licenses, approximately 1400 BTA D, E, and F Block licenses for broadband PCS; and 1,020 licenses for 900 MHz SMR. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Second Annual Report, 12 FCC Rcd 11266, 11277 (1997). Thus, considering only cellular, PCS, and digital SMR, in the future, there could be as many as nine competitors to paging carriers in any particular area.

services. These include Itron, Inc., CellNet Data Systems, Inc., American Mobile, Metricom and Aeris Communications, Inc.[27]

In addition, even if traditional paging is viewed as a separate relevant market, the large number of paging and messaging providers alone offer proof that the merged company could not possibly succeed in adversely affecting competition in that market. Despite the trend toward consolidation, the Commission's own analysis shows that "there are still an average of 29 paging licensees in each of the 25 largest cities in the U.S., not including resellers, and an average of 12 paging licensees in each of the 25 smallest MSAs."[28] Finally, with regard to subscribers desiring nationwide messaging service, approximately ten different carriers on 931 MHz channels and 929 MHz channels alone have constructed sufficient stations to obtain nationwide exclusivity.[29] This latter statistic does not capture those carriers with intercarrier agreements, which allow them to achieve the same geographic scope without expending the capital requirements for nationwide build-out.

There are also numerous narrowband PCS service providers already offering advanced messaging services including SkyTel, PageMart, AirTouch Paging and Metrocall. Other carriers such as TSR will be deploying such services in the near future.

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27 *Fourth CMRS Competition Report,* 14 FCC Rcd at Appendix G, G-1, G-3.

28 *Fourth CMRS Competition Report*, at 14 FCC Rcd at 10190.

29 *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Second Report & Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732 (1997).

C. The Proposed Transaction Will Directly and Significantly Benefit the Public and Advance Important FCC Competition Policies

The Merger will create significant synergies and economic efficiencies that will enhance service to consumers and position the Combined Company as a vigorous competitor in the emerging mobile wireless communications market. As discussed below, the combination of PageNet's broad range of mobile wireless communications products, and new, advanced network and information applications, coupled with AGI's extensive national accounts and direct and retail sales presence in major markets nationwide, will significantly benefit both companies' operations. In addition, the Merger will give customers of the Combined Company greater access to an expanded range of mobile wireless communications products and services, along with greater ubiquity of coverage and reliability with the ultimate consolidation of the two companies' nationwide networks. These operational synergies will benefit subscribers of traditional paging as well as advanced messaging subscribers.

The merger of PageNet and AGI will also create a company with a stronger balance sheet and more economically efficient operations. These benefits will enable the Combined Company to provide better and more sophisticated customer services, will position the Combined Company to compete more effectively in the mobile wireless communications market and create and offer new products and services for its subscribers.

1. The merger will benefit consumers and result in a vigorous competitor in the emerging mobile wireless communications market.

The combination has significant synergies which will facilitate the roll-out of new, innovative services and create new profitable opportunities while maintaining an emphasis on traditional paging services. The companies' operations are strongly complementary. AGI offers its services both through its own direct marketing and sales organization which, as of December 1998, operated approximately 175 retail stores. As a consequence of AGI's means of distribution to end users, it has strong retail marketing and distribution expertise, together with state-of-the-art customer service and support platforms.

AGI's expertise in direct marketing and retail distribution is critically important to survival in the mobile wireless communications marketplace. The mobile units themselves are increasingly complex, especially in the area of advanced messaging services, and more and more potential subscribers are going to retail phone stores, or phone departments, to enable them to choose among the mobile wireless communications products available. AGI's expertise in this area will be invaluable to the Combined Company. Moreover, during the last several years, AGI has been implementing a low-cost provider approach, focusing its management, capital and marketing resources on expanding its presence in one-way paging and ancillary services, such as voice mail, rather than focusing on the capital intensive introduction of new services, such as two-way paging. In advanced paging service, AGI's strategy has been to be a "fast follower."

PageNet has a uniquely complementary strategy. Although it has an internal marketing force, most of its units are sold through a vast community of resellers which, as of year end 1998, accounted for 52.2% of overall unit sales. Moreover, while introducing higher baud technologies over its traditional paging frequencies, PageNet has also built a technologically-advanced network over which it is beginning to offer an expanding array of advanced messaging services. In order to deliver these advanced services, PageNet has acquired three nationwide narrowband PCS blocks, two to four blocks of 900 SMR spectrum at a cost of $197 million and $200 million, respectively, just for the spectrum alone.[30] PageNet has also done extensive work with infrastructure and device manufacturers and software developers, exploring the types of advanced services that may best be offered.

PageNet has formed dedicated groups within the company to create customized mobile wireless information management services for its corporate clients. PageNet's efforts in this area have been to create integrated hardware and software systems that deliver enhanced value to its customers by allowing them to access vital company information from a variety of sources, including company intranets, remote industrial assets, or mobile employees. PageNet is also well-advanced in partnering arrangements with internet content providers such as YaHoo!, CNN, Bloomberg, ESPN, and others.

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30 AGI has invested approximately $101 million in acquiring its narrowband PCS licenses and has spent another $33 million in building out its network. This investment is relatively limited compared to PageNet's financial commitment to narrowband PCS.

PageNet also has a state-of-the-art billing system which will permit the Combined Company to more quickly and effectively roll-out new and bundled products.

This combination of complimentary strengths will foster the Combined Company's opportunity to excel in marketing, across all markets, with both direct, resale and retail marketing, with a broad array of both traditional and advanced services. PageNet and AGI also believe that the Combined Company's larger subscriber base will create greater incentives for manufacturers to engage in research, development and deployment of new equipment for its subscribers. The creation of these additional incentives is important, particularly in light of the decline in traditional paging subscribers. The Combined Company's customer base will likely provide greater incentives for such undertakings.

The combination will create significant economic efficiencies. The Combined Company will also work to identify redundant managerial and administrative functions that its management believes can be eliminated without material impact on customer service. Indeed, it is expected that the Combined Company will be able to capitalize on potential synergies in marketing, distribution and operations resulting in expected annualized savings of $80 million over a two-year period from the date of close.[31] Such economic efficiencies will redound to the benefit of all consumers.

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[31] *Id.* In this regard, we note that the smaller AGI/MobileMedia transaction has yielded substantial savings. Indeed, AGI is well on its way to achieving the $25 million in annual savings originally predicted. *See* COMMUNICATIONS DAILY, Nov. 4, 1999, at 7.

The merger will result in a financially stronger company. The transaction will enable both companies to improve their current weakened financial condition. Specifically, PageNet and AGI will recapitalize, thereby reducing their overall leverage ratios. The combination would immediately provide the Combined Company with more than $1.7 billion in annual revenue and EBITDA of approximately $535 million, based on third quarter 1999 results.[32] This level of financial performance, combined with total debt of $1.8 billion upon completion of the recapitalization, would substantially reduce the Combined Company's leverage to less than 3.5 times EBITDA.[33]

2. Consolidation is critical to the future evolution of advanced messaging as a competitive service in the mobile wireless communications services marketplace.

Traditional one-way paging (numeric or alphanumeric) is essentially a commodity product — it is not highly differentiated and competition for the service is based primarily on price and coverage.[34] As a result, competition has driven prices down to the point where margins are razor thin. Further, traditional paging companies are facing reduced subscriber growth and increased competition from other mobile wireless communications services. Indeed, during the first half of 1999, virtually every paging carrier has

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32 *Arch and PageNet Sign Merger Agreement: Company to be Leader in Wireless Communications*, ARCH NEWS RELEASE, November 8, 1999, <<www.arch.com/news/index.html>>

33 *Id.*

34 Fourth CMRS Competition Report, 14 FCC Rcd at 10180-81, n.196.

experienced some declines in its subscriber growth rates.[35] In addition, carriers offering advanced messaging services are faced with the substantial costs of building-out narrowband PCS networks and deploying new services.

While there are many reasons for the difficulties which paging carriers are facing,[36] the result has been a proliferation of bankruptcies and other financial problems. The bankruptcies of CONXUS Communications, Inc. and MobileMedia Corporation are two well-known examples. While it is unclear precisely which competitors will prove successful in overcoming the current difficulties facing the industry, one thing is clear — providers need to combine if they intend to compete viably with the evolving technologies. Such consolidation offers the most benefits where both companies can contribute unique attributes (such as distribution channels, network and operating (*i.e.*, billing/customer service) systems), achieve cost efficiencies through the combined company's size, and hold sufficient spectrum to roll-out new, innovative products and services in competition with mobile telephony providers with substantially greater resources and spectrum such as Nextel, AT&T, Bell Atlantic/GTE/Vodafone AirTouch, the Bell Companies, and MCI/WorldCom/Skytel/Sprint PCS.

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35 The Strategis Group, *The State of the U.S. Paging Industry: 1999*, § 1.1.1 (November 1999). Appended hereto as Exhibit 3. These materials are examples from the copyrighted publication "*The State of the U.S. Paging Industry: 1999*" This work is published by The Strategis Group, Inc., the exclusive owner of the copyright in this work.

36 The slowdown in subscriber growth rates can be attributed to a number of factors, including price increases, the elimination of unprofitable subscribers, industry maturation, and, as discussed above, increasing competition from digital cellular and PCS carriers. *Id.* at 59.

Mergers to achieve such capabilities are an inevitable result of technological and other industry changes requiring larger more innovative wireless participants. As the Commission notes, two major consolidations have been completed in the last year (including AGI's merger with MobileMedia), along with a number of smaller mergers.[37] These consolidations have resulted in more efficient companies with stronger balance sheets, a fact which has enhanced consumer welfare since the more efficient firms are better able to meet the public demand for higher quality services at increasingly competitive prices. Moreover, there is no evidence that these consolidations led to price increases to consumers.

The need for and importance of consolidation among paging carriers is clearly reflected in independent financial analyses of the industry.[38] For example, one analyst stated:

> The competitive environment has fostered the need for industry consolidation activity . . . . We believe that several operators have done a good job of migrating their business models away from traditional paging operations and toward several promising new industry paradigms. We also believe, however, that paging operators will continue to experience strong competitive pressure from each other as well as other mobile wireless service providers . . . . The competitive forces weighing on the paging industry are such that continued consolidation, either through acquisitions or alliances, is anticipated.[39]

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37 *Fourth CMRS Competition Report*, 14 FCC Rcd at 10183.

38 *Id.*, citing Jeanine Oburchay, *Wall Street Perspective: Is Paging a Lasting Application?*, PAGING NOW, Dec. 10, 1998.

39 Wheat First Union, at 4.

A report from Morgan Stanley concluded:

> Overall, we believe that consolidation in the paging industry should be viewed very positively. We believe that if executed properly, consolidation in the paging sector should lead to a healthier industry overall.[40]

Similarly, a report from Donaldson, Lufkin & Jenrette, stated that:

> The continued trend toward consolidation into major national companies should also benefit the few remaining independent small market operators that stand as attractive fill-in candidates.[41]

This commentary, and the economic trends it reflects, confirms that consolidation among traditional paging carriers is critical to support the industry's efforts to remain viable players in the face of the new competitive realities of the mobile wireless communications market.

D. The Transfer Will Not Produce Any Adverse Competitive Consequences

In addition to the significant benefits the proposed merger will have for AGI and PageNet and their subscribers, the merger will have no adverse competitive impacts either when considering the mobile wireless communications market, or traditional paging in isolation.

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40 S. Coudort, et al., *Wireless Services*, Morgan Stanley, Dean Witter, An Industry "Report, *available in* WL Investext Report No. 2765618, at 17 (Sept. 17, 1998).

41 D.H. Leibowitz, *Broadcasting Cable and Wireless*, Donaldson, Lufkin & Jenrette Securities, An Industry Report, *available in* WL Investext Report No. 2812679, at 3 (Jan. 8, 1999).

1. The Merger will have no adverse impact on the mobile wireless communications market.

There has been aggressive entry into the mobile wireless communications market by paging, cellular, broadband PCS, and digital SMR providers, all of which has led to a quantum leap in competitive alternatives for consumers in this market. At least 18% of adults discontinuing the use of pagers have done so because they bought a mobile phone[42] while the growth of one-way paging has slowed, suggesting that new subscribers to mobile wireless communications are choosing providers other than paging providers in greater numbers than ever before.

Moreover, regulatory and market conditions in the mobile wireless communications industry are such that the competitive pressures imposed by incumbent service providers remain high. The costs of providing service are relatively low — nearly any mobile wireless communications operator can use its existing facilities to transmit various forms of mobile wireless communications services. Further, carriers can deploy the spectrum for use across a broad array of services — this means that carriers not currently offering short messaging can offer it without seeking any regulatory approvals. In fact, the ongoing changes in the regulatory environment in which mobile communications carriers operate "enhances prospects for entry into mobile wireless communications generally."[43] Thus, the mobile wireless communications market is characterized by the presence of numerous competitors and potential competitors, and is

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42 Exhibit 2, *The Market Monitor Report*, at p.33.

43 *Pittencrieff*, 13 FCC Rcd at 8957.

unconcentrated. Consequently, the proposed merger has no negative effect on the competitive landscape of the mobile wireless communications market.

The proposed transaction will also not result in any "unilateral or coordinated effects that enhance or maintain the market power" of the Combined Company.[44] Given the broad range of other large providers of mobile wireless communications services, including large mobile telephony operators such as Nextel, Bell Atlantic/GTE/Vodafone AirTouch, AT&T, the Bell Companies, and MCI/WorldCom/SkyTel/Sprint, other large paging providers, and smaller local paging operators and resellers, there is no basis to conclude that PageNet or AGI would be separately viewed as the next best or essential alternative for the other's customers in any geographic market.[45]

Finally, the Merger will not increase the ability or incentive for the other significant market participants to support or engage in coordinated interaction. After the Merger, Nextel, Bell Atlantic/GTE/Vodafone AirTouch, AT&T, MetroCall, PageMart, SkyTel, Ardis, BellSouth, ReadyCom, Inc., MetroCom, or any other mobile wireless communications competitor, would be no more likely to tacitly or explicitly facilitate non-competitive interaction with the Combined Company than they are with either PageNet or AGI today. In sum, given the numerous providers and unconcentrated market structure, PageNet and AGI submit that the proposed merger will have no adverse impact on the mobile wireless communications market.

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[44] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20009.

[45] *Cf.* Exhibit 2, *The Market Monitor Report*, at p. 45.

2. The Merger will not adversely affect competition among traditional paging carriers.

In addition to the advanced messaging services, the Merger will not adversely affect competition in the provision of traditional one-way paging. The Commission has already found the traditional paging industry to be one of the most fiercely competitive telecommunications services markets.[46] Further, the Commission's rules currently allocate as many as 172 exclusive channels in each geographic market that can be used for messaging and paging services, including: 120 common carrier licenses; 35 private carrier licenses; and 17 narrowband PCS licenses. As the Commission has noted, these licenses are broadly distributed such that, when both providers of common carrier and private carrier paging are considered (excluding narrowband PCS), the nation's 25 largest cities are served, on average, by 29 different licensees, with an average of 12 licensees in the 25 smallest MSAs.[47] Of course, any merger of companies offering the same or similar services will, from a purely static view, increase the level of concentration in that market, but increases in concentration do not, without more, result in competitive harm. The Combined Company, in the markets in which it will possess the most paging channels, will have less than a third of the available channels. In the vast majority of markets, the

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46 *Fourth CMRS Competition Report*, 14 FCC Rcd at 10207. As recently as 1998, the Commission found that there were over 600 paging companies in the United States. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, 13 FCC Rcd 19746 (1998). While there have been some consolidations among these carriers, it is reasonable to conclude that there are still hundreds of different paging companies in the United States.

47 14 FCC Rcd at 10190.

Combined Company's percentage will be significantly lower. Such modest increases in local capacity concentration under these circumstances will have no adverse competitive impact and, under the circumstances, are critical to achieving some of the very efficiencies that make the proposed merger distinctly beneficial both to each companies' existing subscribers, and to the new subscribers the Combined Company intends to serve.

Moreover, new spectrum in some markets will be available for use by messaging and paging service providers this spring when the Commission auctions over two thousand licenses in the 929 and 931 MHz bands.[48] Given the available spectrum capacity and the broad distribution of licenses, it is evident that the Combined Company will not control sufficient spectrum in any market to raise competitive concerns.

Further, the numbers of companies offering paging services prevents any anti-competitive price rise, as demonstrated by historic data. As noted above, there are numerous competitors in every market. It is easy and inexpensive to switch paging carriers, and paging customers do so at a strong rate. Estimated industry churn is on the rise (4.0 percent compared to 3.0 percent in 1997)[49] and, as the Commission notes, one-third of those planning to switch carriers cite price as the reason for switching.[50] There is also evidence that paging demand (at least for some class of customers) is price sensitive,

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48 There is also available an additional 1 MHz of narrowband PCS spectrum which is currently being held in reserve. Consequently, an amount equal to one-third of the total spectrum allocated for narrowband PCS may be auctioned at some future date.

49 14 FCC Rcd at 10190.

50 *Id.*

with customers moving to competitors with lower prices or dropping off the network entirely.[51]

There is also ample opportunity for subscribers to migrate elsewhere should the Combined Company increase rates. As noted, there are currently numerous providers of traditional paging services in all markets, and these other providers possess more than enough capacity to serve a significant numbers of new customers. Moreover, PageNet and AGI, along with most industry analysts, expect that a large percentage of one-way paging subscribers will migrate to two-way services, creating additional capacity on the one-way networks. Finally, traditional providers can create additional capacity using off-the-shelf technologies such as Flex, replacing older POCSAG technologies.[52] In short, one-way paging subscribers will continue to have numerous choices among service providers and thus the Combined Company will be unable to extract non-competitive rates from such subscribers.

In addition, as noted earlier in Section III.A., the prices of alternative messaging services are falling thereby creating an ever descending ceiling above which paging prices cannot rise. The key reason adults own a pager instead of a cellular or broadband PCS

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[51] *Id.*, citing *Gains Too Modest to Assess Paging Industry's Shift in Marketing*, COMMUNICATIONS TODAY, Nov. 9, 1998, *available in* 1998 WL 17661712. The *Market Monitor Report* concluded that price was the most important driver in the decision of whether to buy a pager. Exhibit 2, *The Market Monitor Report*, at p. 42.

[52] PageNet has already made this transition on a number of its frequencies.

phone is that the pager is less expensive.[53] Thus, the co-existence of cellular and broadband PCS with pagers demands that paging prices remain at a lower plateau than mobile phone service. Otherwise, paging customers will be more and more likely to discontinue use of pagers in favor of mobile phone technology as the cost/benefit ratio drives them to more robust devices.[54]

In sum, the presence of numerous competitors, and the unconcentrated nature of the "mobile wireless communications" market, make clear that the proposed merger will not disadvantage either advanced messaging or traditional paging subscribers. As demonstrated, moreover, the proposed merger will result in a company that is better able to provide more sophisticated services to the benefit of subscribers. Accordingly, the Commission should act expeditiously to grant the instant applications.

IV. REQUEST FOR WAIVER OF NARROWBAND PCS RULES

Under Section 24.101(a) of the FCC's rules, narrowband PCS licensees may not have an ownership interest in more than 3 of the 26 narrowband PCS channels in any geographic area.[55] This spectrum aggregation limit will be exceeded when AGI and PageNet merge because PageNet currently holds two 50/50 kHz narrowband PCS channels and one unpaired 50 kHz channel, and AGI holds two 50/12.5 kHz channels for

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53 Exhibit 2, *The Market Monitor Report*, at 59.

54 *See id.* at 42.

55 47 C.F.R. § 24.101(a).

a total of five.[56] As discussed below, PageNet and AGI submit that, in today's competitive market, this spectrum aggregation limit does not serve the underlying purposes of the rule because it is counter productive and does not promote competition.

PageNet and AGI note that the Commission is considering modifying or eliminating the narrowband PCS spectrum aggregation limit in its pending rulemaking on narrowband PCS issues in GEN Docket No. 90-314.[57] As such, and for the reasons stated herein, PageNet and AGI therefore respectfully request that the Commission waive Section 24.101(a) pending completion of the proceedings in GEN Docket No. 90-314.

A. Waiver of the Narrowband PCS Spectrum Aggregation Limit Will Serve the Public Interest.

Under Section 1.3 of the Commission's rules, any provision of the rules "may be suspended, revoked, amended or waived for good cause shown."[58] It is has been well

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56 AGI (through wholly-owned subsidiaries) also holds a non-controlling, minority interest in Benbow PCS Ventures, Inc. (licensee of regional narrowband PCS stations KNKV235, KNKV241, KNKV217, KNKV223 and KNKV229). Issues regarding these Benbow licenses are being resolved with Commission staff in another context and will not be addressed here.

In addition, AGI holds a 10.5 percent interest in CONXUS Communications, Inc., parent of CONXUS Spectrum, Inc. (Licensee of narrowband PCS stations KNKV213, KNKV219, KNKV 225, KNKV 231 and KNKV 237), which is currently the subject of liquidation proceedings under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware. CONXUS has ceased operations, and on December 2, 1999, AGI filed with the U.S. Bankruptcy Court a notice disclaiming any interest in the licenses held by CONXUS.

57 *Amendment of the Commission's Rules to establish New Personal Communications Services, Narrowband PCS*, Report & Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12972 (1997) ("*NPCS Further Notice*").

58 47 C.F.R. §1.3.

settled by the courts that good cause is shown and waivers are appropriate where a petitioner shows that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[59] Similarly, under Section 24.819 of the Commission's Rules, waiver requests relating to the PCS Rules may be granted when the petitioner demonstrates either:

> (1) that the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case and that of the waiver is otherwise in the public interest; or
>
> (2) that the unique facts and circumstances of a particular case render the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative.[60]

PageNet and AGI submit that special circumstances clearly warrant a deviation from the spectrum aggregation limit and grant of the waiver would be in the public interest.[61]

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59 *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir 1990); *see also WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969) *cert. denied*, 409 U.S. 1027 (1972); *see also* 47 C.F.R. § 24.819(a).

60 47 C.F.R. §24.819(a).

61 The Commission cites both the general "good cause" waiver standard set forth in Section 1.3 of the rules as well as the more definitive Section 24.819 standard noted herein as the basis for granting PCS related rule waivers, noting that Section 24.819 is essentially the same as Section 1.3 and is largely a codification of the general waiver standard set forth in *WAIT Radio v. FCC*, 418 F.2d 1153 (1969). *See Application for Review of BellSouth Wireless, Inc. Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Memorandum Opinion and Order, 12 FCC Rcd 14031 (1997).

The Commission established the 150 kHz narrowband PCS spectrum aggregation limit in 1993.[62] In adopting the narrowband PCS limit, the Commission reasoned that the limit will promote competition among PCS suppliers and between PCS and other telecommunications operators.[63] The Commission stated that:

> We conclude that some limits on the holding of multiple licenses are appropriate to ensure that narrowband PCS is offered on a competitive basis.[64]

Further, in limiting narrowband PCS licensees to only three channels, the Commission stated that:

> [W]e also want to provide opportunities for licensees to aggregate or combine channels to provide multiple offerings or wider bandwidth services. Therefore, we will permit a single licensee to hold licenses for up to three 50 kHz channels, paired or unpaired. . . . This plan will allow PCS providers considerable flexibility to combine channels to accommodate specific service needs with also ensuring competition in the provision of services.[65]

In today's environment, three channels are hardly sufficient to provide carriers the "considerable flexibility" that the Commission was seeking to achieve. Put in other

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62 *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Notice of Proposed Rulemaking and Tentative Decision (24397), 7 FCC Rcd 5676, 5707 (1992).

63 The spectrum aggregation limit was not viewed as a protection against spectrum "warehousing." Instead, the cost of spectrum at auction coupled with its construction requirements provides a "significant disincentive to warehouse spectrum." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 1309, 1313 (1994).

64 *Amendment of the Commission's Rules to Establish New Personal Communications Services*, First Report and Order, 8 FCC Rcd 7162, 7168 (1993).

65 *Id.*

words, because narrowband carriers are faced with declining subscriber growth and increasing competition from cellular, broadband PCS, digital SMR and other operations, the underlying purpose of the narrowband PCS spectrum cap is completely frustrated.[66]

The unique condition of the emerging mobile wireless communications market warrants a waiver of the narrowband PCS spectrum cap. First, as already discussed, for the first time in the history of mobile wireless communications services, there is no question that narrowband service offerings compete with identical offerings by the broadband carriers. For narrowband carriers, messaging is their primary offering. For broadband, messaging is an incidental service bundled with voice and other services. To survive, narrowband carriers must be able to offer services that are distinct from the essentially free or reduced-price messaging services offered by broadband carriers. To do this, narrowband carriers must have what broadband carriers possess today — the ability to hold enough spectrum to offer new and innovative services, with high information content. It is absolutely clear that 150 kHz of narrowband spectrum is not enough and, as such, there is no reasonable alternative within the parameters of the spectrum cap.

Another significant factor that supports waiver of the narrowband PCS spectrum cap is the price that was paid at auction for the licenses is more than they are worth today. This fact, coupled with the fact that both PageNet and AGI believe they must have this

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66 This fact is borne out by a single numeric evaluation. A *single*, broadband PCS or cellular carrier holds in a single license more spectrum and, in some cases, many times more, than the entire FCC allocation of paging and narrowband spectrum. Yet it is these very broadband carriers that carriers such as PageNet and AGI must compete against. To have the flexibility envisioned by the Commission when adopting the narrowband spectrum cap, narrowband PCS carriers must be able to utilize more than three narrowband PCS licenses in any market.

spectrum to compete, would make the application of the spectrum cap doubly unfair. Not only would the Combined Company be stripped of its ability to emerge as a meaningful competitor in this CMRS marketplace, the Combined Company would endure a significant financial loss in divesting two of the nationwide narrowband PCS licenses.

Moreover, the spectrum aggregation limit stands as a significant impediment to the consolidation that must occur if paging companies are to provide viable competition to other providers of advanced messaging services. To make sense, industry consolidation must be in the form of mergers of equals, *i.e.*, messaging providers must merge with providers with similar or complementary services. (Broadband carriers have more than enough spectrum to provide messaging.) Such mergers, however, are virtually guaranteed to run afoul of the narrowband PCS spectrum cap, requiring carriers to divest, or return to the Commission, one or more narrowband PCS licenses. As noted above, however, the value of the narrowband PCS licenses in today's market is significantly less than the cost of the license and build-out, and carriers will be unlikely to recover their investment, should they divest a license (assuming that buyers are even available). Consequently, divesting narrowband PCS licenses potentially will create enormous losses for Narrowband PCS licensees, undermining or eliminating the economic value of the transaction. The Commission's rule, therefore, strongly inhibits the kinds of transactions that will be necessary to create viable companies with stronger balance sheets and cash flow and for this reason is contrary to the public interest.

In addition, waiver of the spectrum aggregation limit will *not* result in undue concentration of spectrum. Admittedly, it will mean that the carriers who hold these channels have more spectrum than the FCC originally contemplated, but they will still have far less than their competitors in broadband PCS and other services. Moreover, in some markets, new spectrum will be made available for use by paging and other messaging service providers this spring when the Commission auctions additional 929 MHz and 931 MHz licenses. Also, the Commission has yet to license the local narrowband PCS channels that have been allocated, and there is available an additional 1 MHz of narrowband PCS spectrum which is currently being held in reserve.[67] As such, waiver of the narrowband PCS spectrum aggregation limit will not impair competition.

A waiver in these circumstances would also be wholly consistent with recent Commission precedent. In recent orders regarding spectrum auctions for LMDS, WCS and 220 MHz SMR services, the Commission has explicitly declined to adopt spectrum caps.[68] PageNet and AGI submit that this is a fundamental recognition that spectrum caps serve no significant purpose in competitive markets.

Further, while it was not in the context of a spectrum cap, the Commission provided cellular carriers with additional spectrum in circumstances similar to that facing

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67 Consequently, more than one-third of the total spectrum allocated for narrowband PCS remains to be auctioned at some future date.

68 *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, 12 FCC Rcd 10785, 10787 (1997); *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Radio Service*, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 10951 (1997); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12626-27 (1997).

PageNet and AGI.[69] Specifically, the Commission allocated additional spectrum to cellular services based on findings that cellular radio needed additional spectrum to meet current demand and future growth.

> [W]e find that cellular radio does need additional spectrum to meet its immediate needs. Based on the record, we anticipate that cellular radio systems will continue to have substantial rates of growth. We believe that significant near-term growth will continue with the introduction of additional competition by second carriers in many markets. We also foresee strong long-term growth with the introduction of new, less costly cellular equipment and technology. In addition, we find that existing cellular systems have made substantial efforts to introduce more efficient technology and operational improvements to make better use of the existing available spectrum. Finally, we believe that cellular systems must rely ultimately on technical improvements to meet future demands for cellular services.[70]

In another example, the Commission granted Nextel Communications, Inc. (then Fleet Call) waivers in order to permit aggregation of spectrum for the construction and operation of wide-area SMR systems.[71] Specifically, the Commission allowed Nextel to combine all of its channels in each market into a multi-site, low-power base station

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69 The Commission has also raised the CMRS spectrum cap from 45 to 55 MHz to account for market differences between rural and urban markets. *See 1998 Biennial Regulatory Review: Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, Report and Order, FCC 99-244 (rel. Sept. 22, 1999) ("*Spectrum Cap Order*").

70 *Amendment of Parts 2 and 22 of the Commission Rules Relative to Cellular Communications Systems*, Report and Order, 2 FCC Rcd 1825, 1826 (1986), *reconsideration denied*, 2 FCC Rcd 2515 (1997), *further reconsideration denied*, 4 FCC Rcd 6016 (1989).

71 *Fleet Call, Inc.*, 6 FCC Rcd. 1533 (1991).